Nos. 75-1719, 75-6636, 75-6645, 75-6741, 75-6985

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In the Supreme Court of the United States

OCTOBER TERM, 1976

DONALD R. CARLYLE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

WILLIAM EVANS, PETITIONER

v.

UNITED STATES OF AMERICA

DAVID M. NORDSTROM AND
WILLIAM T. RYAN, PETITIONERS

v.

UNITED STATES OF AMERICA

WILLIE ALBERT MIZE, PETITIONER

v.

UNITED STATES OF AMERICA

TEDDY R. CROUCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

ROGER A. PAULEY,
MICHAEL E. MOORE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

Page

Opinion below 1

Jurisdiction 2

Questions presented 2

Statement 2

Argument 5

Conclusion 11

CITATIONS

Cases:

Berenyi v. *Immigration Director*, 385 U.S. 630 5

Holland v. *United States*, 209 F. 2d 516 10

Holland v. *United States*, 348 U.S. 121 10

Smith v. *United States*, 324 F. 2d 879 8

United States v. *Arroyo*, 494 F. 2d 1316, certiorari denied, 419 U.S. 827 6

United States v. *Bridges*, 499 F. 2d 179 10

United States v. *Huss*, 482 F. 2d 38 8

United States v. *John*, 508 F. 2d 1134 6

United States v. *Park*, 421 U.S. 658 10

Winship, In re, 397 U.S. 358 11

Wisniewski v. *United States*, 353 U.S. 901 11

Wong Sun v. *United States*, 371 U.S. 471 8

Page

Statutes:

18 U.S.C. 371 3

18 U.S.C. 659 ..... 2, 3

18 U.S.C. 922(j) 2

18 U.S.C. 924(a) 2

Miscellaneous:

Rules of the Supreme Court of the United States, Rule 23(1)(e) 5

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OPINION BELOW

The opinion of the court of appeals (Pet. No. 75-1719 App. A-1 to A-14) is reported at 528 F. 2d 625.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1976. A petition for rehearing in Nos. 75-6636, 75-6645, 75-6741 and 75-6985 was denied on March 18, 1976. A petition for rehearing in No. 75-1719 was denied on April 27, 1976. Mr. Justice Stevens extended the time within which to file a petition for a writ of certiorari in No. 75-6741 to and including May 17, 1976. The petitions for a writ of certiorari were filed on April 16, 1976 (No. 75-6636), April 26, 1976 (No. 75-6645), May 11, 1976 (No. 75-6741), May 26, 1976 (No. 75-1719), and June 26, 1976 (No. 75-6985). The petitions in Nos. 75-6645 and 75-6985 are therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence established the existence of a single conspiracy among petitioners as charged in the indictment.

2. Whether the trial court should have suppressed evidence allegedly derived from illegal wire surveillance.

3. Whether the trial court's burden of proof instruction was proper.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Illinois, petitioners were convicted of multiple counts of stealing goods from an interstate shipment, in violation of 18 U.S.C. 659; of unlawful receipt, possession and disposition of firearms ammunition, in violation of 18 U.S.C. 922(j) and 924 (a); and of conspiracy to commit those offenses, in

violation of 18 U.S.C. 371.[1] Petitioners Ryan, Nordstrom and Mize were each sentenced to a total of 22 years' imprisonment. Petitioners Carlyle, Watts, Reid, Crouch and Evans were each sentenced to a total of 13 years' imprisonment.[2] The court of appeals affirmed (Pet. No. 75-1719 App. A-1 to A-14).

The evidence showed that petitioners were members of a large-scale conspiracy that flourished for more than two years, whose aim was the theft of merchandise from interstate railroad shipments passing through "switching" yards in Madison County, Illinois. Most of the members of the conspiracy were employees of the railroad yards. Switchmen and car repairmen went from car to car until desirable goods were found. Yard clerks and railroad policemen located target cars by rummaging through documents in the yard offices while on duty. By tampering with waybills, yard clerks caused cars to be delayed or misrouted. By damaging or "bad ordering" cars, car repairmen caused cars to be placed on repair tracks where they were "hit" at pre-arranged times. Car repairmen and railroad policemen provided company vehicles to haul large volumes of merchandise away from the railroad cars. The conspirators marketed the stolen goods through a few trusted railway employees and non-employee "fences". The stolen merchandise included ammunition, liquor, cigarettes, automobile tires and batteries, air conditioners, garbage disposals, television sets, and other assorted items.

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[1]Petitioner Carlyle was convicted only of conspiracy and of substantive violations of 18 U.S.C. 659; he was not named in any of the firearms counts.

[2]All but petitioner Carlyle received sentences on the conspiracy count that are to run concurrently with sentences imposed on at least one of the substantive counts of which they were convicted. Petitioner Carlyle's conspiracy sentence runs consecutively to the sentences imposed in connection with his substantive violations.

Petitioners Nordstrom (a yard clerk) and Ryan (a car repairman) were the central figures in the conspiracy. Joel Koen, a railroad policeman who was the government's chief witness at trial, testified that he received bribes from those two men in January 1972 to "get lost" while they burglarized some railroad cars. Later during the winter of 1972, Nordstrom and Ryan established a permanent relationship with Koen whereby Koen would protect the theft ring from detection in his role as a yard policeman, and, in return, Koen would receive an equal share of the proceeds of any theft he assisted. (Tr. III 866-884, 900-902.)[3]

Koen further testified that petitioner Carlyle participated with him and petitioner Ryan in the theft of automobile tires in February 1972 (Tr. III 881-884) and in the theft of approximately 50 cases of cigarettes in May 1972 (Tr. III 913). The evidence also showed that petitioner Carlyle participated in the theft of air conditioners in May 1972 with Ryan, Koen and others (Tr. III 924-927; Tr. VI 1744-1747) and aided in disposing of stolen .38 caliber ammunition in April 1972 (Tr. V 1351-1354).

Petitioner Watts, another yard policeman, participated in the theft of color television sets in June 1972 (Tr. III 928-931), of liquor in July 1972 (Tr. III 952), and of .22 caliber ammunition in October 1972 (Tr. IV 970-976).

Petitioner Evans participated with Watts, Nordstrom, Ryan, Reid, Crouch and others in the October 1972 theft of .22 caliber ammunition (Tr. IV 970-976) and, along with petitioner Carlyle and others, stole approximately 120 cases of cigarettes in July 1973 (Tr. VI

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[3] "Tr. I" through "Tr. VIII" designates the transcript of petitioners' trial.

1688-1694). In October 1973, petitioners Evans, Ryan, and Carlyle were arrested in possession of tires and games that they had stolen earlier from two separate cars (Tr. VI 1597-1650).

Petitioners Reid and Crouch acted primarily as distribution agents for the theft ring (Tr. V 1390-1392, 1460, 1461-1464, 1467-1468; Tr. VI 1707-1711), although they both participated directly in the October 1972 theft of .22 caliber ammunition (Tr. IV 983-989).

Petitioner Mize associated himself with the group as early as April 1972, and from that time until the end of the conspiracy in the fall of 1973, Mize was the group's chief "fence." During the course of the conspiracy Mize had theft-related personal contacts with at least petitioners Crouch, Reid, Ryan, Nordstrom, Carlyle, and Evans (Tr. III 919-921, 933-936; Tr. IV 977-979; Tr. V 1352-1356, 1403; Tr. VI 1740-1743).

ARGUMENT

1. Petitioners Evans, Crouch, Mize, Carlyle, Watts, and Reid contend that the evidence established multiple conspiracies rather than the single conspiracy of which they were convicted. We note at the outset that none of the petitions contains a statement of the evidence or advances any interpretation of the evidence in support of this contention. This failure violates Rule 23(1)(e) of the Rules of this Court and warrants denial of the petitions as to this contention.

Moreover, this is an essentially factual claim that was rejected after careful consideration by the court below (Pet. No. 75-1719 App. A-8 to A-10), and for that reason too it does not merit further review. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635. The evidence clearly established that petitioners were members of a well-organized, on-going conspiracy to steal merchandise from

interstate railroad shipments and to "fence" the proceeds of their thefts. The thefts were carried out by groups with often overlapping memberships. After each theft, the stolen goods were usually fenced through a common distribution network. The fact that all members of the conspiracy did not participate in every theft, or that some members were unaware of particular thefts, did not preclude a finding that all of the thefts were part of the same general scheme. By associating himself with the conspiracy, each member was assured that he would make money when he did participate in a given theft and that his participation would not be disclosed by those who did not take part in the particular theft. Although the government did not present direct evidence of an explicit agreement among the conspirators, the evidence established the existence of a mutual understanding among the members that, by working in concert and by protecting each other, the thefts would be more profitable and less susceptible of detection than by working individually.[5]

2. All petitioners contend that the trial court should have suppressed evidence allegedly derived from illegal electronic surveillance conducted by private security police at the railroad yards between August 1972 and January 1973. This contention was correctly rejected by both courts below.

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[5]Petitioners Carlyle, Watts, Reid, Crouch and Mize claim that the trial court abused its discretion in refusing to grant their respective motions for severance. But their claim is apparently premised on the erroneous view that there were separate conspiracies and that they were consequently prejudiced by the "spillover" of incriminating evidence adduced against their co-defendants, who under their theory were members of unrelated conspiracies. These petitioners also claim that it was error for the court to refuse to give a multiple conspiracy instruction. But such an instruction was not required here, since the evidence could not reasonably have supported a finding of multiple conspiracies. See *United States* v. *John*, 508 F. 2d 1134, 1138 (C.A. 8); *United States* v. *Arroyo*, 494 F. 2d 1316 (C.A. 2), certiorari denied, 419 U.S. 827.

After petitioners had been indicted, the government informed defense counsel that the railroad police had illegally wiretapped three telephone extensions at the Madison County switching yards. At the hearing on petitioners' motions to suppress all evidence derived from the illegal taps, the government made all individuals who had any connection with the electronic surveillance available for examination by defense counsel (Tr. 6/18/74, pp. 23-27).[6] The evidence at the hearing showed that the chief of the private railroad police, William Wagner, began monitoring the telephone lines in question in August 1972. The railroad police kept notes of the monitored conversations (*id.* at 38-46). Chief Wagner discontinued the surveillance in January 1973 and destroyed all the tapes and notes after he discovered that he could be prosecuted for his illegal surveillance activities (*id.* at 53-57, 67-68). The surveillance was instituted without the knowledge of the government; and although Chief Wagner disclosed his surveillance activities to F.B.I. Agent David Jackson and consulted Agent Jackson regarding their legality (*id.* at 67-68), he did not at any time tell Agent Jackson that he planned to destroy the tapes and notes (*id.* at 158-159, 173).

Agent Jackson was the only government investigator who was exposed to any information gathered by the railroad police through the illegal surveillance. He testified at the hearing that Chief Wagner had played a portion of a tape for him consisting of a conversation between petitioner Nordstrom and Joel Koen, the government's chief witness at trial, concerning the location of boxcars containing cigarettes and tires (*id.* at 133-139). On

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[6]"Tr. 6/18/74" and "Tr. 8/16/74" designate the transcript of the hearing on petitioners' motions to suppress. "Tr. 10/9/74" designates the supplemental hearing on the admissibility of government witness Joel Koen's testimony.

another occasion, Chief Wagner informed Agent Jackson of a recorded conversation between petitioner Nordstrom and Koen concerning the theft of some Scotch whiskey (*id.* at 143, 150). Agent Jackson testified that the information he learned from Wagner in this manner did not significantly further his investigation. Petitioner Nordstrom's involvement in the theft ring was already known by Agent Jackson at the time (*id.* at 146, 171-178).

Thus, the only government evidence that could have been derived from the illegal private wire surveillance was that flowing from Agent Jackson's discovery of Koen's involvement with petitioner Nordstrom. However, as the court below accurately observed, "the potential of Koen as a witness and/or defendant was not learned solely from the overheard conversations" (Pet. No. 75-1719 App. A-6). Rather, the record established that Alcohol, Tobacco and Firearms Agent David True, who was not aware of the wiretaps, learned during his independent undercover investigation of the theft ring that Koen was one of the security policemen involved in protecting the thieves (*ibid.*; Tr. V 1392; Tr. 10/9/74, pp. 7-8).

Moreover, even assuming that the government's interest in Koen was attributable in part to the disclosure of the illegally monitored conversations to Agent Jackson, Koen's decision to cooperate with the government's investigation and to appear as a government witness at petitioners' trial was "sufficiently an act of free will to purge the primary taint" of the illegal surveillance. *Wong Sun* v. *United States*, 371 U.S. 471, 486. See also *Smith* v. *United States*, 324 F. 2d 879, 881 (C.A.D.C.)[7]. At a supple-

[7]Thus this case differs considerably on its facts from *United States* v. *Huss*, 482 F. 2d 38 (C.A. 2), a contempt proceeding for failing to answer questions allegedly the fruit of an illegal electronic interception. Although petitioners contend that *Huss* conflicts with the ruling below, it is clear that here the destruction of the tapes did not "withhold [from petitioners] the means or tools" to meet the burden of going forward with a showing of taint (*id.* at 47), nor was the government responsible for the destruction of the tapes in the instant case.

mental hearing to explore the circumstances that led to Koen's decision to testify against petitioners, Koen stated that he had been considering striking a deal with the government when he was first interrogated by government agents and had consulted an attorney about that possibility. Koen also stated that, when the agents told him they knew he was involved in the ring, he assumed that their information came from Ronald Ridgeway, another member of the conspiracy (Tr. 10/9/74, pp. 8-10, 33-34). The agents made no promises of leniency to Koen during the interview. Koen decided freely and voluntarily to tell the agents what he knew (*id.* at 8-10).[8]

3. Petitioners Mize, Evans, Crouch, Carlyle, Watts and Reid argue that the following jury instruction was erroneous because it equated "reasonable doubt" with "substantial doubt", thereby lowering the government's burden of proof (Tr. VII 2040-2041):

> A defendant in a criminal case is presumed by law to be innocent. That presumption remains with him

[8]Petitioners Carlyle, Watts, Reid, Crouch, Mize and Evans argue that the trial court erred in failing to find that they were "aggrieved persons" within the meaning of 18 U.S.C. 2510(11), with standing to challenge the illegal wire surveillance. As the court of appeals noted (Pet. No. 75-1719 App. A-6), there is no reason to review this claim, since the government successfully carried its burden of showing that none of its trial evidence was tainted by the illegal wire interception evidence. In any event, none of the above-named petitioners made a credible showing of standing to seek suppression. After it was determined that the illegal surveillance occurred between August 1972 and early 1973, the trial court invited petitioners to show that they participated in conversations over the monitored telephone lines during that period (Tr. 8/16/74, pp. 73, 78). Only petitioner Reid came forward. He claimed that he had engaged in an incriminating conversation over the monitored lines with petitioner Nordstrom (who was adjudged to be an "aggrieved person") in October 1972 concerning the theft of .22 caliber ammunition, but he then denied that he was in any way connected with the theft (*id.* at 93-97). The trial court apparently disbelieved Reid's claim because of this contradiction.

throughout the trial unless and until he is proven guilty of the crime charged by credible evidence beyond a reasonable doubt.

The burden of proving any defendant guilty beyond a reasonable doubt rests upon the Government. This burden never shifts throughout the trial. The law does not require a defendant to prove his innocence or to produce any evidence. He may rely upon evidence brought out on cross examination of witnesses for the Government. If the Government fails to prove any defendant guilty beyond a reasonable doubt, the jury must acquit him.

"A reasonable doubt" means a doubt that is based on reason and must be substantial rather than speculative. It must be sufficient to cause a reasonably prudent person to hesitate to act in the more important affairs of his life.

When considered in the context of the total charge, *United States* v. *Park*, 421 U.S. 658, the instruction "correctly conveyed the concept of reasonable doubt to the jury." *Holland* v. *United States*, 348 U.S. 121, 140. The context makes clear that the trial court used the word "substantial" to mean "real" or "non-speculative," rather than "of great magnitude," as petitioners' argument implies.[9] The court of appeals therefore, while criticizing the use of the word "substantial," properly found no reversible error.[10]

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[9]Similarly, in *Holland, supra*, the trial court's instruction at one point used the word "substantial," noting that a reasonable doubt meant a "substantial doubt, not a trivial doubt." See *Holland* v. *United States*, 209 F. 2d 516, 522 (C.A. 10).

[10]Petitioners contend (Pet. No. 75-1719 at 11) that the court of appeals' failure to hold that the instruction constituted reversible error conflicts with the decision of another panel of the Seventh Circuit in *United States* v. *Bridges*, 499 F. 2d 179, 186. While the *Bridges* court did criticize the use of the phrase "substantial doubt" in burden of proof instructions and suggested that the trial court revise its instructions at retrial, its decision to grant a new trial in the case was premised on other grounds. In any event, any conflict between different panels of the same court would be for that court to resolve. *Wisniewski* v. *United States*, 353 U.S. 901.

Petitioner Mize also argues (Pet. No. 75-6741 at 9) that, by instructing the jury that a defendant might "rely upon evidence brought out on cross-examination of witnesses for the Government," the trial court imposed at least a minimum burden of proof on him. However, the trial court emphasized in its instruction that the burden of proof "rests upon the Government," that it "never shifts throughout the trial," and that "[t]he law does not require a defendant to prove his innocence or to produce any evidence." The charge as a whole made it clear that the burden of proof rested entirely on the government and thus did not constitute error. *In re Winship*, 397 U.S. 358.

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

ROGER A. PAULEY,
MICHAEL E. MOORE,
Attorneys.

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